STATE OF MICHIGAN

COURT OF APPEALS

NATIONAL CITY BANK,

Plaintiff/Counter Defendant-Appellee,

v

JOSEPH VERDUN and HARRIET VERDUN,

Defendants/Counter Plaintiffs-Appellants.

UNPUBLISHED
August 15, 2006

No. 267955
Oakland Circuit Court
LC No. 2004-058961-CK

Before: Whitbeck, C.J., and Hoekstra and Wilder, JJ.

PER CURIAM.

Defendants appeal as of right the trial court's order granting summary disposition in favor of plaintiff on its claim for a retail installment contract that had become stated. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendants purchased a yacht in 1997 and, using the yacht as collateral, executed a retail installment contract with plaintiff's predecessor for $216,314.31. Under the contract, defendants are prohibited from disposing of any interest in the collateral and are required to preserve their interest in the collateral and to not allow any other lien or security interest to be placed on the collateral. The contract provides that plaintiff could discharge any such lien or security interest, and plaintiff's expenses would be an additional loan. The contract also provides that several specified conditions constitute a default, including if defendants "fail to do anything you agree to do or do anything you agree not to do under the agreement," or if plaintiff was "justly apprehensive that you will not pay all amounts you owe us when they are due, or that the collateral will not be readily available to us if we later seek to take possession of it." The contract further provides:

> If you are in default, you agree to deliver the collateral to us when and where we request. We have all of the legal rights of a secured party, including the right to take possession of the collateral if you are in default and, after reasonable notice to you, to sell or otherwise dispose of it and apply the proceeds to our expenses and your obligations to us under this agreement. You agree that any notice we give you in connection with the repossession, sale or other disposition of the collateral will be reasonable if we mail it to you at least 5 days before the sale, lease or other disposition of the collateral, at the last address you have given us.

The yacht was stored at the Gregory Boat Company in Detroit. A dispute arose between defendants and Gregory Boat about the amount of storage and service fees. On November 7, 2003, Gregory Boat notified plaintiff that the yacht would be sold to satisfy a lien for storage, labor, and materials if $7,205.43 was not paid by January 6, 2004. On November 21, 2003, plaintiff paid Gregory Boat $6,470.43 and repossessed the yacht. During the dispute between defendants and Gregory Boat, defendants remained current on the installment contract with plaintiff and also maintained a savings account at plaintiff bank containing more than $100,000.

Plaintiff maintained by affidavit and its business records that it mailed a "Notice of Our Plan to Sell Property" to defendant Joseph Verdun at an address in West Bloomfield, and an identical notice to defendant Harriet Green[1] at an address in Detroit. Plaintiff maintained that the notices were properly mailed on the day they were prepared, as is plaintiff's ordinary practice. The notice stated that plaintiff intended to sell the yacht at a private sale sometime after December 10, 2003, and that defendants would be liable for any deficiency. The notice stated on its face, "SENT REGULAR U.S. MAIL." However, defendant Joseph Verdun claimed in an affidavit that he never received the notice.

On December 5, 2003, defendant Joseph Verdun called plaintiff to determine the status of the yacht and offered to reimburse plaintiff its expenses in satisfying and discharging the lien and continue with the regular monthly payments. Plaintiff told defendant that if he provided employment verification he could redeem the yacht. On December 11, 2003, plaintiff sold the yacht for $86,000, which left a deficiency of $109,168.91 on the outstanding balance under the installment contract. On December 18, 2003, defendant Joseph Verdun provided proof of his self-employment as a physician to plaintiff. At the end of December 2003, defendants withdrew the funds from their savings account.

Plaintiff sued defendants for the deficiency. Defendants counter-sued, alleging wrongful repossession and violation of various consumer protection statutes. The parties cross-motioned for summary disposition. The trial court issued a written opinion and order granting plaintiff's motion and denying defendants' motion. A judgment for $124,708.22 was entered against defendants.

On appeal, defendants argue that they were entitled to summary disposition of plaintiff's claim that defendants did not pay the principal or interest due on the contract because the monthly installment payments were current and defendants had in excess of $100,000 in a savings account at all times during the dispute with Gregory Boat and the subsequent repossession and sale of the yacht. Defendants further argue that under the contract, if a lien or security interest was placed on the yacht, plaintiff would satisfy and discharge the lien or security interest and simply add its expenses as an additional loan to the contract. Further, they contend that the contract does not provide that an unauthorized lien or security interest constitutes a default, and if there is any ambiguity in the contract regarding whether a lien or a security

[1] Harriet Verdun and Harriet Green are apparently the same person. The record does not contain an explanation as to why different names were used in different documents.

interest constitutes a default, the ambiguity must be construed against plaintiff, which drafted the contract.

This Court reviews de novo the grant or a denial of a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Contrary to defendants' argument, the existence of Gregory Boat's lien constitutes a default under the contract. The contract provides that when defendants do something that they agreed not to do, a default occurs. Under the contract, defendants agreed not to permit a lien or security interest to be placed on the yacht. By not resolving their dispute with Gregory Boat, defendants effectively permitted a lien to be placed on the yacht, violating the contract and resulting in a default. Also, the contract provides that a default occurs if plaintiff reasonably believes that defendants were not paying their debts as they became due or that it would not be able to take possession of the collateral. Because Gregory Boat informed plaintiff of its lien on the yacht and its intent to sell the yacht to satisfy the lien, plaintiff could have reasonably believed that defendants were not paying their debt to Gregory Boat when the debt became due and that if the yacht were sold to satisfy Gregory Boat's lien it would not be readily available to them.

After the default occurred, plaintiff was permitted under the contract to accelerate the debt, possess the yacht, and sell it to satisfy defendants' obligation. The fact that defendants were current on their monthly payment obligations and had over $100,000 in a savings account at plaintiff bank is irrelevant to the existence of the default and plaintiff's remedies for the default, which included acceleration of the debt.

Defendants also claim that the sale of the yacht was not commercially reasonable because plaintiff did not provide notice to them of its intent to sell the yacht, the length of the notice did not provide defendants with "sufficient time to take account of the disposition," and defendants were current on their monthly obligations. We disagree. Defendants primarily argue that Joseph Verdun did not receive notice of the sale. Under MCL 440.9611(2), plaintiff, as a secured party that intended to dispose of collateral under MCL 440.9610, was required to send to defendants a "reasonable authenticated notification of disposition." The statute does not define "reasonable authenticated notification." However, the contract addressed this issue by stating: "You agree that any notice we give you in connection with the repossession, sale or other disposition of the collateral will be reasonable if we mail it to you at least 5 days before the sale." Further, the statute only requires the creditor to send the notice; it does not require the creditor to prove that the notice was received.

Plaintiff complied with both the contract and the statute. According to the affidavit of plaintiff's employee and plaintiff's account records, the notices were prepared and mailed to Joseph Verdun and to Harriet Green (Verdun) on December 1, 2003, notifying them that the yacht would be sold after December 10, 2003. Thus, according to plaintiff, the notices were mailed more than five days before the date of the sale. Defendants do not present any evidence that the notices were not mailed at least five days before the sale. Defendant Joseph Verdun states in his affidavit that "National City did not provide me with any notice of intent to sale [sic] the yacht." Presumably this means that he did not receive the notice because he does not state any facts of which he had personal knowledge establishing that plaintiff did not mail the letters, did not address them correctly, or did not affix proper postage. Of some relevance, we note that defendant Harriet Verdun has not claimed in an affidavit that she did not receive a notice of the sale.

Defendants also contend that the sale was commercially unreasonable because the ten-day notice was not "sufficient time to take account of the disposition." The purpose of a notice requirement is (1) to allow a debtor to exercise redemption rights, (2) to give a debtor any opportunity to bid at the sale or encourage others to bid to assure a fair price, and (3) to allow a debtor to oversee every aspect of the disposition to maximize the selling price. See *Honor State Bank v Timber Wolf Construction Co*, 151 Mich App 681, 687; 391 NW2d 442 (1986). Defendants have not presented any evidence that the notice did not give them sufficient time to achieve the purposes of the notice requirement. Defendants did not present any evidence that they were unable to exercise their redemption rights within ten days or that they did not have an opportunity to secure funds or credit to bid at the sale. Further, defendants did not present evidence of any impropriety or irregularity in the conduct of the sale that rendered it commercially unreasonable or that they did not receive the fair value of the yacht. Thus, they have not shown that the sale was commercially unreasonable with respect to the conduct of the sale or the amount received for the yacht.

Affirmed.

/s/ William C. Whitbeck
/s/ Joel P. Hoekstra
/s/ Kurtis T. Wilder